82-1062

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO.:

JOSEPH LEROY ARMSTRONG,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THE PETITIONER ON COUNTS I AND IV OF THE INDICTMENT.

B. DURING THE TRIAL OF THE PETITIONER, THERE WAS AN AMENDMENT OF THE INDICTMENT OR A FATAL VARIANCE BETWEEN THE CONSPIRACY CHARGED AND THE PROOF ESTABLISHED AT TRIAL.

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PETITION FOR WRIT OF CERTIORARI
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The Petitioner, JOSEPH LEROY ARMSTRONG, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 28, 1982.

OPINION BELOW

The Court of Appeals entered its decision affirming the conviction of the Defendant at trial. A copy of the decision is attached as Appendix A.

The Court denied Petitioner's petition for rehearing on August 27, 1982. A copy of that order is attached as Appendix B.

JURISDICTION

On June 28, 1982, the Court of Appeals affirmed the conviction of the Defendant at trial. The jurisdictions of this Court is involved under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

> No person shall be deprived of life, liberty, or property, without due process of law. No person shall be held...unless on a...indictment of a Grand Jury.

UNITED STATES CONSTITUTION, AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation.

STATEMENT OF CASE

The Petitioner was indicted with Clarence Sheppard Davis and James O. Davis and others for conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute in violation of 21 U.S.C.§§846 and 841(a)(1), among other charges.

The genesis of the case began when certain D.E.A. agents approached James Cohron to act as a middle man for Defendant, James Davis. The negotiations fell through but later James Davis and the agents arranged for a sale of cocaine in which Davis would get cocaine from "his source" and sell it to the agents using Cohron as a middle man. James Davis was in contact with Cohron and the agents several times by telephone and in person over a two (2) day period.

Ultimately, on August 22, James O. Davis, Clarence Davis, and Joseph Armstrong arrived at Cohrons home. One of the three (3) men gave Cohron a brown bag containing cocaine. All individuals went inside a bedroom where Cohron and James Davis discussed the delivery of coca-

ine and Cohron's fee in a low tone of voice. Joseph Armstrong stood by the door approximately six (6) feet away. Armstrong while in the bedroom announced to James Davis and Cohron that he did not want to be involved in any delivery of cocaine. Armstrong asked to stay at Cohron's house while the others delivered the cocaine but Cohron infomed him that he would not permit Armstrong to stay in his house while his Wife and children were present.

Clarence Davis, James Davis and Joseph Armstrong entered into the automobile together, and Clarence Davis drove the car while following Cohron to a motel. While parked at the motel, agents approached the car with their badges visible. Clarence started the car up, but did not move the car. Armstrong exited the back seat of the automobile but was detained by the agents. A loaded gun was found in the back seat of the car.

The Petitioner was charged with Clarence Davis, James O. Davis, James Cohron, Gerry Hencye, and William Norrie with conspiracy to distribute cocaine from February, 1980 until August 23, 1980.

By means of a statement of particulars, the Government stated that the conspiracy was conducted in Texas, Alabama and Florida.

Prior to trial, the Court conducted a James hearing. Pursuant to that hearing, it determined that two (2) independent conspiracies existed - one(1) between Hencye, Norrie and Cohron, the other between Cohron, Davis, Clarence and Armstrong. The Court found that sufficient evidence existed to link the Petitioner with the conspiracy and therefore heresay statements of co-conspirators would be admissable against him.

Although the Court subsequently dismissed Hencye and Norrie from the case, they were still included on the original indictment. The indictment was not amended to constrict the parameters of the conspiracy as stated in the indictment. Nor was the indictment amended to show the shorter duration of the conspiracy.

At trial, the proof showed that the conspiracy had fewer participants than alleged in the indictment, covering a smaller geographical area, and was of shorter duration.

At trial, the Petitioner, was convicted of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute. The Petitioner appealled his convictions to the Eleventh Circuit Court of Appeals. That Court sustained the convictions of the Petitioner.

REASONS FOR GRANTING THE WRIT

A.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF THE PETITIONER ON COUNTS I AND IV OF THE INDICTMENT.

During the James hearing, heard prior to trial, the testimony showed that the governments informant, Sarah Smith, said that she traveled with Gerry Hencye and William Norrie to Texas in April of 1980 to get cocaine. During that trip, Hencye informed her that he received cocaine from James O. Davis. Subsequently, James Davis and Smith attempted to negotiate a separate cocaine deal. During none of her encounters, did Smith meet or hear about Petitioner, Joseph Armstrong.

James Cohron testified at the James hearing that he worked for Gerry Hencye and had attempted to set up a deal with James O. Davis. He testified that neither Hencye or Norrie knew the Petitioner. Furthermore, Cohron testified that he did not know of nor met Petitioner, Armstrong, until August 22, 1980.

During the trial, the Court held another James hearing. During that hearing the Court

heard testimony concerning the series of events which occurred on August 22, 1980 at Cohrons house and at the subsequent place of their arrest which was enumerated in the Statement of Facts.

Based upon these facts, the Court held that a substantive and independent conspiracy existed between Cohron, James O. Davis, Clarence Davis and Joseph Armstrong.

The Fifth Circuit Court of Appeals set the standards for the burden of proof to allow introduction of hearsay statements of alleged co-conspirators and to sustain a conviction for conspiracy in U.S. v. James, 590 F2d 575 (5th Cir.), cert denied, 442 U.S. 917 92 S.Ct. 2836, 61 L.Ed.2d 283 (1979) and U.S. v. Grassi, 616 F2d 1295 (5th Cir. 1980).

Under this standard, the trial court must first determine if there is sufficient evidence of conspiracy and secondly, if the non-hearsay evidence linking the Defendant to the conspiracy is substantial.

If the testimony presented at the James hearing is sufficient under this standard, then

heresay statements of co-conspirations may be admissible against the Defendant when the declaration is made by a co-conspirator, during the course of the conspiracy, and in furtherance of the conspiracy. Grassi, supra at 1300.

Grassi establishes the principal that a judge must review the independent evidence at the conslusion of the trial as to whether or not the government has by independent evidence demonstrated the Defendant's participation in the conspiracy.

The Government must prove beyond a reasonable doubt that (1) a conspiracy existed, (2) the Defendant knew of the existance of a conspiracy and (3) with that knowledge, the Defendant voluntarily joined the conspiracy. U.S. v. Gutierrez, 559 F2d 1278 (5th Cir 1977).

In taking into consideration the third element of a conspiracy, Courts have consistently held that a person does not become a co-conspirator simply by virtue of knowledge of the conspiracy and association with the conspirators. U.S. v. Grassi, (supra).

As the Eleventh Circuit Court of Appeals noted in its opinion in this action, the essential facts which sustained the Defendant's conviction were that (1) Armstrong accompanied Clarence Davis and James O. Davis to Cohron's home. (2) He was present in Cohron's bedroom when James Davis and Cohron discussed the details of the sale of the cocaine although he took no part in the discussions and no testimony was offered that Armstrong heard the discussion. (3) Armstrong asked Cohron if he could stay at Cohron's house because he did not want to be involved in the delivery of the cocaine and Cohron refused. (4) Armstrong was in the backseat of the motor vehicle carrying James O. Davis and Clarence Davis which followed the automobile containing Cohron who went to consumate the sale of cocaine. (5) Armstrong started to walk away when D.E.A. agents approached the automobile containing Armstrong and the Davis's. (6) A firearm was found in the backseat of the automobile although there was no showing that it belonged to the Defendant, Armstrong. (at page 1886)

The Eleventh Circuit in its opinion stated that Armstrong's presence in Cohron's house where the cocaine was weighed and the details of the sale discussed coupled with the fact that Armstrong wanted to wait at Cohron's house while the others delivered the cocaine showed that Armstrong knew that (1) a conspiracy to distribute cocaine existed and (2) Armstrong knew of it.

Even if one concedes that the foregoing facts establish the first two (2) elements of a conspiracy, those facts fall woefully short of establishing beyond a reasonable doubt that Armstrong agreed to participate in the conspiracy. The Eleventh Circuit Court of Appeals decision conflicts with several other cases which have considered like cases.

In U.S. v. Reyes, 595 F2d 275 (5th Cir. 1979), the Defendant was indicted in the Middle District of Florida for conspiracy to import marijuana and importation of marijuana in violation of 21 U.S.C.§§952(a) and 960(a)(1) and 963. They were subsequently convicted of those charges.

The evidence at trial showed that the air traffic controller at Tampa International Airport picked up a signal from a transponder on an airplane located approximately 45 miles off the coast of Florida. The airplance did not respond to raido contact and was tracked in an erratic course for almost three (3) hours. Customs agents in a plane followed the airplane as it landed at the St. Petersburg-Clearwater airport and taxied off the runway. Agents immediately approached the plane and discovered the Defendant and four (4) others inside it.

In examining the airplane, the agents discovered that the number on the airplane had been altered, the door of the aircraft and the interior were smeared with pineapple, pieces of rope were found inside the plane along with a Columbian newspaper, and the Defendant's themselves were Columbians. In vaccuming the floor of the plane, marijuana was discovered. Furthermore bales of marijuana were found floating in the Gulf of Mexico wrapped with rope which was similar to that found in the plane and which were located near the course of the flight of the

airplane.

The Defendant's appealed their conviction of both charges and the Fifth Circuit Court of Appeals reversed stating that there was insufficient evidence to sustain the conviction. The Court reasoned that although the evidence showed that a conspiracy to import marijuana existed, between all four (4) defendant's existed and inferred that the Defendant's knew of the existance of that conspiracy.

However, the Court focused its attention on the fact that there existed no direct testimony that any of the Defendant's pushed the marijuana bales into the Gulf and then smeared the pineapple in the plane to mask the odor of the marijuana. Although the Court conceded that the Defendants may possibly have participated in the acts in furtherance of the conspiracy, the Court noted that the government did not show beyond a reasonable doubt that "one or more defendants went along for the ride." at page 281.

Similarly in U.S. v. Grassi, 616 F2d 1295 (5th Cir. 1980), Defendant Grassi was charged

and convicted of conspiracy to distribute unregistered handguns. At trial, the evidence showed that D.E.A. agents met with a person named Watson who introduced the Defendant to him. Initially, Defendant Grassi showed interest in distributing marijuana. However, on one occassion Grassi was at a meeting with agents and other co-defendants in which the sale of silencers was discussed with certain co-defendants. Grassi was present during these conversations, knew the participants, listened to them, but did not participate in the discussion.

Prior to trial, the Court held a James hearing which showed no evidence that Defendant Grassi intented to participate in the cnspiracy to distribute firearms. The Court, however, held that Grassi's participation in the conspiracy was sufficient to allow co-conspirator's statements against him.

In reversing Defendant Grassi's conviction on that charge, the Fifth Circuit stated that one does not become a co-conspirator simply by virture of knowledge of a conspiracy and assoc-

iation with the conspirators. The Court also stated that:

> "To connect the Defendant to a conspirator, the prosecution must demonstrate that the Defendant agreed with others to join the conspiracy and participate in the achievement of the illegal objective."
>
> Grassi, at 1301

Yet another case on point is U.S. v. Gutierrez, 559 F2d 1278 (5th Cir. 1977). There, the Defendant was charged with conspiracy to distribute heroin and possession of heroin with intent to distribute and was convicted of both counts.

The evidence established that Gonzales, who was Gutierrez's nephew, entered into several arrangements with D.E.A. agents to sell heroin. The agents saw Gonzales go to the Defendant's house before he returned to the agent with the heroin on several occasions. On several occasions, they saw Gonzales talking to the Defendant prior to returning to the agent with the heroin.

The officers never saw any drugs or money pass between Gonzales and the Defendant. After Gonzales was arrested, the agents procurred and got a search warrant of the Defendant's house.

That search revealed $400.00 of marked currency in a bank bag in a chest.

On Appeal, the Fifth Circuit reversed the Defendant's conviction because of the insufficiency of the evidence. The Court noted that even the fact that the Defendant and another acted in close proximity to each other and even if the Defendant is actually present at the scene of the crime, are insufficient to establish a conspiracy.

It should also be noted that it is red letter law that flight alone is not enough to support a finding of guilt. See U.S. v. Caro, 569 F2d 1091 (5th Cir. 1978); U.S. v. Flores, 564 F2d 717 (5th Cir. 1977).

Other case relevent as to the sufficiency of evidence in a conspiracy are U.S. v. Littrell, 574 F2d 828 (5th Cir. 1978); U.S. v. Soto, 591 F2d 1091 (5th Cir. 1979) (where the Defendant was talking to two (2) conspirators who were involved in a off-loading venture, walked away when an agent approached him, and had a gun in his back pocket); U.S. v. Olivia, 497 F2d 130 (5th Cir. 1974); and U.S. v. Martinez 486 F2d

15 (5th Cir. 1973).

The Eleventh Circuit in its opinion noted that the trial jury could infer that Armstrongs preference to stay at Cohron's house meant that his job of delivering the cocaine to James Davis was over and that he did not want to incur further risk by being near the scene of delivery. (at page 1888). The Court makes this inference despite the absence of evidence that indicated that Armstrong, in fact, delivered cocaine to Cohron. The evidence, in fact, suggests that Clarence Davis brought the cocaine to James Davis.

The Eleventh Circuit in its opinion also stated that a jury could "reasonably infer that Armstrong was avoiding arrest" when he left the automobile after the agents approach. (at page 1888). The Court further inferred that the gun found in the back seat indicated that "Armstrong knew he was involved in an illegal transaction and was protecting his interest in the conspiracy". (at page 1888). Lastly, the Court inferred that the evidence supported Armstrong's conviction for possession of cocaine with intent to distribute because he was with Clarence

Davis and James Davis when the cocaine was weighed and because he was with them when they followed Cohron to the motel. The Court finally stated that "the jury could infer from the loaded gun that Armstrong was protecting his interest in the cocaine." (at page 1889).

There was no evidence which would suggest that the Petitioner had control over the illegal substance although the Petitioner concedes that evidence of knowledge was present. Because of this, there was not sufficient evidence which would sustain a conviction for constructive possession of cocaine.

The Petitioner suggest that the evidence could as easily infer that the Petitioner was simply a by-stander who did not know of the conspiracy until he was in Cohron's house, attempted to disassociate himself from the others but could not, and was only present at the time of arrest because Davis' automobile was his only means of transportation.

As the U.S. Supreme Court has stated in Ingram v. U.S., 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959), "Charges of conspiracy

are not to be made out by piling inferences upon inferences."

It is exactly that principal which the trial court allowed when it refused to grant to the Petitioner a judgment of acquittal and which the Eleventh Circuit sustained it its decision.

B.

DURING THE TRIAL OF THE PETITIONER, THERE WAS AN AMENDMENT OF THE INDICTMENT OR A FATAL VARIANCE BETWEEN THE CONSPIRACY CHARGED AND THE PROOF ESTABLISHED AT TRIAL.

The Grand Jury, after hearing testimony presented by the Government, chose to allege that the Petitioner along with Clarence Davis, James Davis, Cohron, Hencye and Norrie conspired to distribute cocaine over a seven (7) month period of time in a multistate operation.

After the James hearing prior to trial, the trial Judge suggested to the Government that it seek an amended indictment since the proof at that hearing showed that two (2) separate conspiracies existed. Instead of doing this, the Government sought the Court to dismiss the indictment against Hencye and Norrie.

Outside of those dismissals, the indictment remained the same as when it was originally drafted.

In addition, the Government in responding to a Request for a Bill of Particulars stated that the conspiracy took place in Florida, Alabama, and Texas.

As stated previously in this petition, the Government's proof at trial was limited to the events which occured on August 22, 1980, in the State of Florida.

On Appeal, the Eleventh Circuit Court of Appeals ruled that the proof at trial did in fact vary from that alleged in the indictment. However, the Court held that a constructive amendment of the indictment did not take place. The Court did rule that a non-prejudicial variance of the indictment did occur.

Although the Court conceded that the proof at trial varied from that alleged in the indictment in that the evidence showed a conspiracy which involved fewer people, of shorter duration and in a smaller area, the Court held that it gave sufficient notice to the Petitioner of the charges against him. (at page 1886).

The Petitioner disagrees with the Eleventh Circuit's opinion and respectfully suggests that the Defendant's fundamental right to a fair trial and his right to trial only upon an indictment by a Grand Jury both guaranteed to him by the Fifth Amendment to the United States Constitution was violated. This issue also violates the Defendant's Sixth Amendment right to be adequately apprised of the crime charged. Other Circuit's who have considered these issues have reached different conclusions than that of the Eleventh Circuit in the case at bar.

The fundamental principal concerning this issue is that an amendment to an indictment is prejudicial per se whereas, a variance between the allegations of the indictment and the proof at trial is subject to the harmless error rule. See Watson v. Jago, 558 F2d 330 (5th Cir.1977).

The starting point for any analysis of this issue begins with Ex Parte Bain, 121 U.S. 1, 7 F.S.Ct. 781, 30 L.Ed. 849 (1887). In Bain, during trial, the Court struck certain words from the indictment because the Court felt that they were material. The Defendant was ultim-

mately convicted. However the U.S. Supreme Court granted a writ for habeas corpus and held that a Defendant could only be tried upon the indictment as found by the Grand Jury and that language in the charging part could not be changed without rendering the indictment invalid.

Bain involved a situation where the indictment was literally amended. Approximately, seventy-five (75) years later the U.S. Supreme Court considered a situation where an indictment was constructively amended in Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252 (1960).

In Stirone, the Defendant was indicted for unlawfully interfering with interstate commerce in violation of the Hobbs Act. The indictment charged that the Defendant caused to move sand in interstate commerce between various points in the U.S. and Pennsylvania. However, at trial, the Government also submitted evidence of the effect on interstate commerce involving steel shipments from steel plants in Pennsylvania into Michigan and Kentucky. In addition, the Court instructed the jury as to these steel shipments.

In considering these facts, the U.S. Supreme Court reversed the Defendant's conviction and held that the basic protection the Grand Jury was designed to afford Defendant's is defeated when the Government subjects the Defendant to prosecution for crimes which the Grand Jury did not charge. Because of this, the Defendant was convicted of a charge which the Grand Jury never made against him.

The hallmark case concerning variances is Berger v. U.S.,235 U.S. 78, 55 S.Ct. 629 (1935). There, a Defendant was indicted and convicted of conspiracy to utter counterfeit notes. Three (3) other individuals were named in the indictment as co-conspirators.

The evidence at trial showed that there were actually two (2) separate conspiracies with one (1) individual who was involved in both. Although the Supreme Court reversed the Defendant's conviction on other grounds, the Court held that a variance between the allegations contained in the indictment and the proof proved at trial, this variance was not material in that the proof at trial established a conspiracy against only one of them. The

Court did note that a variance is filled where an indictment charges one (1) large conspiracy and the proof shows two (2) different and distinct smaller conspiracies provided that Defendant's substantial rights have been prejudiced.

The major case involving the Defendant's Sixth Amendment right to be informed of the nature and cause of the accusation is Russell v. U.S., 369 U.S. 749, 8 L.Ed.2d 240, 82 S.Ct. 1038 (1962). There the Defendant refused to answer certain questions pro-pounded to him by a Congressional subcommittee. He was indicted and convicted of violation of 2 U.S.C.§192. The indictment, however, failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated.

The Court in discussing this matter stated that the sufficiency of an indictment is governed by two (2) criteria. The first is whether the indictment contains all elements of the charge and therefore sufficiently apprises the Defendant of what he must be prepared to meet at trial; secondly, whether the record shows with accuracy to what extent he may plead

former jeopardy.

In using this standard, the Court noted that there was no problem in the indictment concerning the second standard but it did not pass muster regarding the first criteria. (at page 251, L.Ed. 2d)

The Court noted that it was a fundamental principal that an indictment not framed to apprise the Defendant with reasonable certainty of the nature of the accusations against him is defective although it may follow the language of the stature. (at page 251 L.Ed.2d).

In considering the sufficiency of the indictment, the Court reversed the Defendant's conviction because the indictment did not fully apprise the Defendant of the charges against him. In addition to a Sixth Amendment violation, the Court stated that an amendment of the indictment took place at trial. It noted that:

> "[To] allow the prosection, or the court, to make a subsequent guess as to what was in the minds of the Grand Jury at the time they returned the indictment would deprive the Defendant of a basic protection which the guaranty of the intervention of a Grand Jury was designed to secure. For a Defendant could be convicted on the basis of facts not found by, and perhaps not even presented to the Grand Jury which indicted him."

369 U.S. at 770

As the Eleventh Circuit Court of Appeal noted in its opinion the indictment does allege all elements of the charge. The Petitioner's agreement is that he was not apprised as to the crime that he was charged.

While there is an abundance of case law which deals with the situation where the proof at tiral expands the allegations of the indictment and consequently violates a Defendant's constitutional rights, there is little case law which explores the ramifications of proof at trial which contracts the parameters of the indictment. The Petitioner suggest that in cases, where the proof at trial is so much different than that alleged in the indictment that a Sixth Amendment violation occurs.

A case which is somewhat analogous to this situation is United States v. Hinkle, 637 F2d 1154 (7th Cir. 1981). There the Defendant was charged in six counts of an indictment with using a telephone to facilitate acts constituting a felony under 21 U.S.C.§841(a)(1).

None of the counts specify which controlled substance in 21 U.S.C.§841(a)(1) discussed on the telephone. One hundred and forty-two contr-

olled substances are listed in that section. The Defendant was convicted at trial.

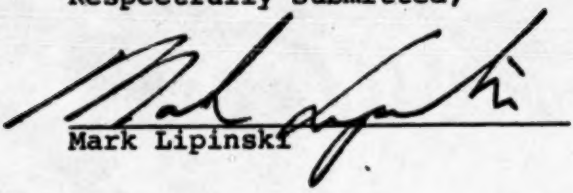
The Seventh Circuit Court of Appeals reversed the Appellant's conviction and held that the Defendant's Sixth Amendment right to be apprised of the charges against her was violated by the over-inclusive indictment. See also Gray v. Raines, 662 F2d 564 (9th Cir. 1981).

Because count Four of the indictment charging the Petitioner with a conspiracy to distribute cocaine in a seven month period occuring allegedly in three (3) states was so overinclusive when compared to the proof established at trial, the Petitioner's Fifth Amendment right to be charged only upon an indictment by a Grand Jury and his right to be informed as to the nature and cause of the crime against him was violated.

CONCLUSION

For the foregoing reasons, Petitioner JOSEPH ARMSTRONG respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,



Mark Lipinski

IN THE SUPREME COURT OF THE UNITED STATES
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NO.:

JOSEPH LEROY ARMSTRONG,

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vs.

UNITED STATES OF AMERICA,

Respondent

PROOF OF SERVICE

STATE OF FLORIDA)
) ss.:
COUNTY OF MANATEE)

MARK LIPINSKI, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA on counsel for the Petitioner by enclosing a copy thereof in an envelope, first class postage prepaid, adressed

to: Solicitor General of the United States Department of Justice, Washington, D.C. 20530 and to the United States Attorney's Office for the Northern District, P.O. Box 12313, Pensacola Florida, 32581 and depositing same in the United States mails at Bradenton, Florida on the 17th day of December, 1982.

Mark Lipinski, Affiant

Subscribed and Sworn to Before Me
this the 17th day of December, 1982.

Notary Public In and For
Said County and State

Notary Public, State of Florida
My Commission Expires 9/23/85
Bonded by American Fire & Casualty Company